MOUNTAIN STATES TELEPHONE AND TELEGRAPH CO.

IBLA 83-190 Decided April 5, 1984

Appeal from decision of Colorado State Office, Bureau of Land Management, determining annual rental charges for communications site right-of-way. C-16991.

Affirmed.

1. Appraisals--Communication Sites--Rent--Rights-of-Way: Act of March 4, 1911--Rights-of-Way: Appraisals

   Where the BLM granted a communications site right-of-way pursuant to the Act of March 4, 1911, as amended, 43 U.S.C. § 961 (1976), subject to future appraisal, collection of a rental deposit at the time of the grant with a later adjustment in the annual rental charges upon receipt of an approved fair market value appraisal is not a prohibited imposition of a retroactive rental.

2. Appraisals--Communication Sites--Rent--Rights-of-Way: Act of March 4, 1911--Rights-of-Way: Appraisals

   Appraisals of rights-of-way for communication sites will be upheld if there is no error in the appraisal methods used by the BLM and the appellant fails to show convincing evidence that the charges are excessive.

APPEARANCES: Steven Miller, Esq., Denver, Colorado, for appellant.

OPINION BY ADMINISTRATIVE JUDGE IRWIN

The Mountain States Telephone and Telegraph Company has appealed from a decision of the Colorado State Office, Bureau of Land Management (BLM), dated October 29, 1982, determining annual rental charges for its communications site right-of-way, C-16991.

Effective August 17, 1973, BLM granted a 50-year right-of-way for the Lands End microwave repeater site and an access road to appellant, pursuant to the Act of March 4, 1911, as amended, 43 U.S.C. § 961 (1976) (repealed by section 706(a) of the Federal Land Policy and Management Act of 1976 (FLPMA), P.L. 94-579, 90 Stat. 2793 (1976), subject to valid existing rights). The right-of-way is situated in the NE 1/4 SW 1/4 sec. 15, T. 11 S., R. 97 W., sixth principal meridian, Mesa County, Colorado. The right-of-way grant provided, in part, that: "A rental deposit of $750.00 has been made. Applicant will be called upon to remit the required rental after the site appraisal is made."

On June 8, 1976, the Chief State Appraiser, BLM, approved an appraisal report which concluded that the fair market rental value of appellant's right-of-way on August 17, 1973, was $1,400. Accordingly, by decision dated June 9, 1976, BLM determined annual rental charges of $1,400 for appellant's right-of-way. BLM required payment of a lump sum for the period August 17, 1973, to December 31, 1980, with an adjustment for the $750 already on deposit, within 30 days of receipt of the decision. By letter dated July 9, 1976, appellant protested the "increased rentals" for various rights-of-way, including C-16991, requested a hearing pursuant to 43 CFR 2802.1-7(e), and indicated that the rentals would be paid "under protest." 1/ By letter dated July 29, 1976, BLM informed appellant that it was not entitled to a hearing under 43 CFR 2802.1-7(e) with respect to an "initial assessment" of rental charges and directed appellant to pursue an appeal to the Board. By letter dated September 1, 1976, appellant renewed its request for a hearing.

On September 11, 1980, a BLM appraiser prepared an appraisal report which, using the comparable lease method of appraisal, concluded that the fair market rental value of appellant's right-of-way for the 5-year period beginning August 17, 1973, was $1,000. Also, on September 12, 1980, the BLM appraiser concluded in another appraisal report that the fair market rental value of appellant's right-of-way for the 5-year period beginning August 17, 1978, was $1,500.

In its October 1982 decision, BLM vacated the June 1976 decision setting the fair market rental value of appellant's right-of-way at $1,400, and, based on the 1980 appraisal reports, set the fair market rental value at $1,000 "for the period commencing on August 17, 1973, and ending on August 16, 1983." We note that, in doing so, BLM applied the lower fair market rental value, as between the two September 1980 appraisal reports, to the 5-year period from 1978-1983. Finally, applying the amount already on deposit, BLM required appellant to pay the remainder of the rental charges for that 10-year period "within 30 days of receipt of this decision," or to appeal. This appeal followed.

In its statement of reasons for appeal, appellant contends that the October 1982 decision constitutes an improper retroactive assessment of annual rental charges in violation of section 504(g) of FLPMA, 43 U.S.C § 1764(g) (1976), which provides that the holder of a right-of-way shall pay annually "in advance" the fair market value of a right-of-way. Appellant notes that 43 CFR 2803.1-2(b) provides, in part, that BLM may establish an "estimated rental fee" in order to facilitate the processing of a right-of-way grant, with an adjustment to be made later upon appraisal, but concludes that the regulation, promulgated in 1980, cannot be applied retroactively. See 45 FR 44526 (July 1, 1980). Appellant also argues that the appraisal was erroneous and that, therefore, the fair market rental value of $1,000 is "excessive." Appellant incorporates all objections made with respect to the reappraisal of the fair market rental value of microwave transmission site rights-of-way in American Telephone & Telegraph Company, docketed as IBLA 82-343.

1/ In its October 1982 decision, BLM reports that "on August 30, 1976, Mountain Bell paid BLM $4,850.00, which, when added to the advance rental deposit of $750.00, would have satisfied Mountain Bell's rental obligation at $1,400.00 per year for the period commencing on August 17, 1973, and ending on August 15, 1976."

By order dated November 23, 1983, we noted that a decision in American Telephone & Telegraph Co. (IBLA 82-343), 77 IBLA 110 (1983), had issued and directed appellant to submit "such further statement of reasons as it deem[ed] appropriate in light of that decision * * * listing with specificity those reasons why it considers the appraisal erroneous." On January 16, 1984, appellant submitted a further statement of reasons, asserting again that the appraisal was erroneous because: (1) BLM used a renegotiated private lease as a comparable lease; (2) it is "unclear" whether the appraiser contacted both lessor and lessee in order to assure the accuracy of the details of each comparable lease; (3) the appraiser did not take into account the differences between private and BLM leases; and 4) it is "debatable" whether comparable leases were used.

[1] The first question which we address is whether the October 1982 decision constitutes an improper retroactive assessment of annual rental charges. Appellant's right-of-way was issued pursuant to the Act of March 4, 1911, supra, prior to enactment of the right-of-way provisions of section 509(a) of FLPMA, 43 U.S.C. § 1769(a) (1976). See Mountain States Telephone & Telegraph Co., 60 IBLA 221 (1981). Accordingly, we do not reach the question of whether BLM may retroactively apply 43 CFR 2803.1-2(b) to appellant's right-of-way, thereby permitting the estimation of annual rental charges subject to a later appraisal. That regulation was promulgated in order to implement the right-of-way provisions of FLPMA, see 43 CFR 2800.0-1, and is not applicable to a non-FLPMA right-of-way. 2/

With respect to rights-of-way issued pursuant to the Act of March 4, 1911, supra, neither the statute nor its implementing regulations specifically provided for issuance of a right-of-way subject to a later appraisal of the fair market rental value. The applicable regulation, 43 CFR 2802.1-7(a) (1973), merely stated that rental charges "will be the fair market value of the * * * right-of-way * * * as determined by appraisal by the authorized officer." We conclude there is no unfairness in construing the statute and its implementing regulations to permit BLM to collect a rental deposit at the time of issuance of the right-of-way with the actual rental charge to be determined by a later appraisal. Moreover, the right-of-way grant in this case, as noted supra, specifically put appellant on notice that this was the procedure which would be followed. Aside from the fact that this procedure expedited the processing of the right-of-way grant, permitting appellant to use the site at an earlier time than it might otherwise have, appellant, prior to June 1976, had the use of the site without having to pay anything more than the original rental deposit. Accordingly, the October 1982 BLM decision will not be considered an improper retroactive assessment.

[2] Appellant next challenges the appraisal, upon which the October 1982 BLM decision was based, as erroneous. In its initial statement of

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2/ Even if this were not so, we recently held that BLM may retroactively assess annual rental charges pursuant to 43 CFR 2803.1-2(b) in the case of a FLPMA right-of-way even where the right-of-way was granted prior to promulgation of the regulation. See Mountain States Telephone & Telegraph Co., 79 IBLA 5 (1984). In addition, we concluded that application of the regulation did not conflict with section 504(g) of FLPMA, supra, where payment "in advance" was only required after fair market value had been determined.

reasons, appellant incorporates all of the objections raised in American Telephone & Telegraph Co., supra. However, in view of our November 23, 1983, order, we construe appellant's further statement of reasons as focusing on the objections it specifies.

Appellant first argues that BLM used "at least one" renegotiated private lease as one of the comparable leases in assessing the fair market rental value of its right-of-way. In American Telephone & Telegraph Co., supra at 118-19, we disallowed "the use of renegotiated private leases as comparables in view of the substantial danger that, owing to a disparity in bargaining power, the lessor took advantage of his dominant position." Appellant, however, has not identified which of the three leases used as a comparable lease in arriving at the fair market rental value of $1,000 was a renegotiated private lease, and we cannot, based on the record, characterize any of the leases as such.

Appellant also argues that BLM may not have verified the accuracy of the details of the comparable leases. The record belies this concern. While it is unclear whether BLM contacted both the lessor and the lessee, the information sheet for each lease indicates that the information therein was verified by a named person other than the source of the information. In American Telephone & Telegraph Co., supra at 122, we characterized the November 19, 1981, decision of the Director, BLM, to verify the details of comparable lease data with the lessor and the lessee as "the only acceptable approach." However, appellant has provided no evidence which challenges the accuracy of the details of the comparable leases involved herein, unlike the appellant in American Telephone & Telegraph Co., supra, nor indicated how any supposed inaccuracies would affect the appraisal. Accordingly, we have been shown no reason to doubt the accuracy of that data.

Appellant also argues that BLM did not take into account the differences between private and BLM leases. These differences become crucial to the assessment of the comparability of private leases with the BLM right-of-way being appraised, as well as the need for adjustment in order to assure comparability. In American Telephone & Telegraph Co., supra at 119-20, we stated:

> We have recently recognized that the terms and conditions of BLM rights-of-way, where they differ from private lease comparables, may affect comparability, and that BLM appraisers properly took these differences into account. These differences included the possibility, even though deemed remote, of discontinuation or modification by the Secretary, nonexclusivity, and rental revision every 5 years. We note that, in some cases, private leases may be comparable to BLM rights-of-way with respect to certain terms and conditions. In such a situation, no adjustment need be made. But, in evaluating the comparability of private leases, BLM should take into account all of the differences which might affect fair market value. It may be that provision for lease termination, nonexclusivity, and the like may have only a limited effect upon fair market value. Absent evidence of this, however, we are not disposed to rule upon this question at the present time. If BLM believes that certain differences between private comparables and Government leases have no effect on

> ultimate comparability for valuation purposes, the basis for its belief must be documented. [Emphasis added.]

In the present case, the BLM appraiser took differences in location, physical characteristics, access, power, tenure, lease date, and size into account in the September 1980 appraisal. While the appraiser may have decided implicitly that differences other than these did not affect fair market value, we will not draw that conclusion in the absence of any discussion in the record. In any case, appellant has offered nothing to demonstrate that these differences do affect fair market value or that the annual rental charge is excessive because the appraiser did not take these differences into account. We have long held that appraisals of right-of-way for communications sites will be upheld if there is no error in the appraisal methods used and the appellant fails to show by convincing evidence that the charges are excessive. E.g., Donald R. Clark, 70 IBLA 39 (1983). Appellant has demonstrated no error. Rocky Mountain Natural Gas Co., 55 IBLA 3 (1981); cf. Colorado-Ute Electric Association, 79 IBLA 53 (1984).

Finally, appellant argues that BLM may not have used leases which were "appropriately similar to the communication site here under consideration." The 1980 appraisal report took into account the similarities and differences between the comparable leases and the subject right-of-way, in terms of location, physical characteristics, access, power, tenure, time and size. Without any indication of error in these comparisons by appellant, its argument cannot prevail. Rocky Mountain Natural Gas Co., supra.

In the absence of any identified error in the appraisal of the fair market rental value of appellant's right-of-way, we conclude that BLM properly set the annual rental charges for the right-of-way.

Therefore, pursuant to the authority delegated to the Board of Land Appeals by the Secretary of the Interior, 43 CFR 4.1, the decision appealed from is affirmed.

Will A. Irwin
Administrative Judge

We concur:

Gail M. Frazier
Administrative Judge

Franklin D. Arness
Administrative Judge